

DRIVERLESS VEHICLES

By Robert Miller, Esq.

Governor John Kasich recently signed an executive order permitting autonomous car testing on any public road in the state. Kasich said he wants to make Ohio a “wild, wild west” for autonomous car testing, removing any legal barriers that would currently restrict such testing. Not only does this allow autonomous cars with a backup driver behind the wheel as seen in Arizona, but also cars with no driver on board at all. Most states, especially in the wake of a fatal crash in Arizona, are holding back on the loosening of regulations allowing even greater autonomy than test cars have now.

The Arizona fatality is the first known death involving a self-driving car. Reports indicate that the autonomous vehicle struck a woman walking her bicycle in the late evening, and that the vehicle was moving at about 40 MPH without slowing down. A review of the data indicates that the sensors detected the woman but did not view her as a threat to the safe operation of the vehicle. Autonomous vehicles have to be able to process the environment around them and successfully determine what may be, for instance, a pedestrian that needs to be avoided, as opposed to a piece of newspaper blowing around in the roadway that can be safely ignored. There is little doubt that this case serves as a harbinger of things to come, and no matter how far-fetched it may seem that our interstates will one day be full of autonomous vehicles, it may come sooner than we think.

Advances in automotive technology have remained remarkably steady over the last 50 years. A brochure for 1958 Chryslers and Imperials touted a new feature called “Auto-Pilot,” which was described as “an amazing new device that helps you maintain a constant speed and warns you of excessive speed.” Today we of course know this as cruise control. Anti-lock brakes have been commercially available since the 1970s. Electronic stability control was introduced in the mid-1990s. In recent years, “driver assist” technologies have become prevalent, such as automated braking systems to avoid forward collisions and automated parallel parking systems. Nevertheless, no matter how conditioned we have become to such automations, ceding most, if not all, control of our vehicles to onboard computers feels like a leap in technology that we may not be fully prepared for. From a legal standpoint, it could result in a sea-change for how garden variety automobile accident cases are litigated.

For instance, if a vehicle is fully automated there is technically no operator. One could potentially be riding in the vehicle just as one would ride a city bus. Would the fact that they may actually own the vehicle change the liability picture? And what role will insurance play? Will no-fault legislation come to Ohio? Will human error be completely ruled out or does the driver have a responsibility to maintain and service the vehicle in compliance with the manufacturer’s instructions? Will we move completely away from the traditional user/driver error to defaults caused by defects in the technology products used in the vehicle? At this point there are more questions than answers.

If Governor Kasich gets his wish and Ohio becomes the wild, wild, west for autonomous cars, product liability attorneys are going to have to deal with the fallout under the law as it is

presently constructed, and product liability claims are certain to have a role. Autonomous vehicle claims will therefore be analyzed under the risk-benefit analysis codified in O.R.C. 2307.75. Since these types of claims have only just begun to develop (the Arizona Uber case settled days after the event without the benefit of discovery), we are forced to make educated guesses about where investigations may take us. Here some thoughts.

Software defects pose a potentially fertile ground for autonomous vehicle product errors. For instance, software designs that depend on inadequate sensor data (either in terms of content or transmission speed) or that fail to perform safe driving maneuvers. Inadequate pattern recognition, collision avoidance algorithms, or human-computer coordination may also lead to errors. This type of information will likely be available in what amounts to 'black box' data recording devices.

It would be advisable to review whatever testing procedures and risk assessments are available to see if the manufacturer is looking for data in a responsible way as these new devices interact with the driving environment. Determine whether the manufacturer has kept documentation up to date to justify the steps taken with respect to design, manufacturing and testing processes and to see if it failed to act reasonably with regard to state of the art developments and any relevant industry standards.

Review product warnings and instructions provided to consumers and determine whether they are appropriately updated to address evolving consumer expectations. Check for recalls on the systems. There are sure to be many.

Finally, take care in finding the appropriate expert. There is little doubt that professional experts will attempt to cash in on this frontier even though they have little understanding of the engineering behind these burgeoning systems. Find someone with design experience. It may be costly, but it will be entirely necessary.

Looking further down the road, it is interesting to contemplate how autonomous vehicles will be regulated fifteen or twenty years from today. Will there be federal regulation or will it be entirely state driven? The National Highway Traffic Safety Administration (NHTSA) is the federal agency with responsibility for motor vehicle safety. The agency has yet to establish detailed regulatory standards for autonomous vehicles, which could conceivably preempt state law; or, NHTSA might simply provide some baseline framework and leave the states relatively free to take their own approaches. Product liability attorneys who have an interest in this science would be wise to stay abreast of developments in the law across all states. Ohio courts will certainly be inclined to look at how other states have addressed novel issues and there will be ample opportunity to shape Ohio law going forward.

Where science goes so goes the law. Right now, on this topic, we're in the wild, wild west.